

FCC MAIL SECTION

REPORT AND ORDER
(Proceeding Terminated)Before the
Federal Communications Commission
Washington, D.C. 20554

OCT 73

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Accepted: October 3, 1995;

Released: October 20, 1995

By the Chief, Allocations Branch:

DISPATCHED BY

MM Docket No. 93-17

In the Matter of

Amendment of Section 73.202(b).

RM-8170

Table of Allotments.

FM Broadcast Stations.

(Rosendale, New York)

1. At the request of the State University of New York ("petitioner"), licensee of noncommercial educational Station WENP, Channel 204A, Rosendale, New York, the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 947 (1993), proposing the allotment of Channel 273A to Rosendale and the modification of Station WENP's license to specify the alternate Class A channel. Comments were filed by the petitioner and counterproposals were filed by Raymond A. Natole ("Natole") and jointly by Sacred Heart University, Inc. and Radio South Burlington ("SHU/RSB").¹ Reply comments were filed by the petitioner, WMHT Educational Telecommunications ("WMHT"), SHU/RSB² and Bambi Broadcasting, Inc. ("Bambi").^{3 4} For the reason discussed below,

¹ Neither of the counterproposals is acceptable for consideration in this proceeding. Natole requests that Channel 255A be allotted to West Hurley, New York, as its first local aural service, instead of to Rosendale. Natole failed to serve a copy of its pleading on the petitioner, as required by 1.420(a) of the Commission's Rules. However, in light of our action herein, we will consider Natole's request as a new petition for rule making and issue a separate Notice of Proposed Rule Making.

RSB is the permittee of Station WQQQ, Channel 277A, Sharon, Connecticut and SHU is the licensee of noncommercial educational FM Station WSHU, Fairfield, Connecticut. They request that Station WQQQ's construction permit be modified to specify Channel 273A and that its community of license be changed from Sharon to Washington, New York. In addition, they request that Channel 277A remain allotted to Sharon but that it be reserved for noncommercial educational use. SHU states its intention to apply for Channel 277A at Sharon. This counterproposal is not acceptable for consideration since Section 1.420(i) only permits the modification of a station's authorization to specify a new community of license where the new allotment is mutually exclusive with the licensee's or permittee's present assignment. Here, RSB seeks modification to a non-adjacent channel and thus there is no mutual exclusivity. In its reply comments, RSB/SHU argues that its counterproposal should have been accepted since the proposed channel allotments comply with the Commission's spacing requirements. They contend that even if non-technical problems exist which ultimately would lead to the denial of the counterproposal, these problems are not a bar to the acceptance of the counterproposal. RSB also claims that the Commission should have accepted its counterproposal and sought comment on the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit accordingly. RSB acknowledges that the proposed allotment of Channel 273A to Sharon was not explicitly stated in the counterproposal but argues that it was implicit in its proposal. It now specifically states that it wants to be modified to Channel 273A even if the station must remain a Sharon facility.

We disagree with SHU/RSB. Counterproposals must be technically and procedurally correct when filed and may not be amended at a later date. See *Arlington, Texas, et al.*, 8 FCC Rcd 4281 (1993), *Hondo, Texas, et al.*, 7 FCC Rcd 7610 (1992), *Flora, Mississippi, et al.*, 7 FCC Rcd 5477 (1992). Contrary to SHU/RSB's apparent belief, the failure to state specifically their alternate proposal to allot Channel 273A to Sharon and modify Station WQQQ's construction permit accordingly renders the counterproposal both technically and procedurally defective.

Further, we find that SHU/RSB has not shown any reason why the Commission should have, on its own motion, proposed the allotment of Channel 273A to Sharon and the modification of Station WQQQ's license accordingly. RSB, in its reply comments, states that the change of channel is necessary to allow it to operate with 6 kW of power. However, the counterproposal clearly states that Channel 277A, which is Station WQQQ's presently authorized channel, can be operated with 6 kW at the site of an existing tower and provide all of Sharon with the required 70 dBu city-grade service. If the sole purpose of the counterproposal were to provide Sharon with its first local noncommercial educational service, then it would have been necessary to submit a proposal requesting only the allotment of Channel 273A to Sharon and no mention of Channel 277A, at either Sharon or Washington, would have been necessary. Therefore, we do not agree that the allotment of Channel 273A to Sharon and the modification of Station WQQQ's construction permit to specify the alternate Class A channel to be either implicit in or a logical outgrowth of RSB/SHU's counterproposal. Further, even if we were to agree that the allotment of Channel 273A to Sharon were properly before the Commission, we note that RSB/SHU has failed to include a technical showing that the channel can be allotted in compliance with the Commission's minimum distance separation requirements or, at a minimum, to provide proposed coordinates for such an allotment. Therefore, the counterproposal fails to meet the requirement that a petitioner provide a technical showing demonstrating compliance with the Commission's rules. See *Provincetown, Massachusetts, et al.*, 8 FCC Rcd 19 (1993), *Big Spring, Texas, et al.*, 7 FCC Rcd 4834 (1992).

² SHU/RSB's reply comments relate to the acceptability and public interest benefits of its counterproposal. As stated in footnote 1, *supra*, the counterproposal is not acceptable for consideration and thus the potential public interest benefits need not be discussed.

³ Bambi's reply comments consist of an expression of interest in applying for Channel 273A, if allotted to Washington. This pleading is moot in light of the dismissal of SHU/RSB's counterproposal.

⁴ After the record closed the following unauthorized pleadings were received: "Motion for Leave to File Supplemental Reply Comments" and "Supplemental Reply Comments" filed by SHU/RSB; "Petition for Leave to File Natole's Comments on SUNY Response to SHU/RSB Supplemental Reply Comments" filed by Natole; "Response to SHU/RSB Supplemental Reply Comments" filed by SUNY; and "Motion for Leave to Respond to Natole's Comments on SUNY Response to SHU/RSB Sup-

we will not modify the noncommercial educational license of station WFPN to operate on Channel 273A as a commercial station. Instead, we will allot Channel 273A as a commercial channel and open a filing window.

DISCUSSION

2. In reviewing our earlier *Notice*, we discovered that we had proposed to modify petitioner's license for Station WFPN to specify operation on Channel 273A as a commercial station.⁵ As stated in the *Notice*, noncommercial educational stations generally operate within the reserved portion of the FM band (Channels 201-220). Exceptions have been made in cases where channels in the noncommercial band are not available because of foreign allocations (Canadian or Mexican) or potential interference to TV Channel 6 operations. Here, there is no channel within the noncommercial band for use by Station WFPN because of the community's proximity to other existing domestic licensees, not because of the existence of either Canadian stations or TV-6 interference problems. Therefore, we find that, consistent with Commission precedent, we cannot modify Station WFPN's license from a noncommercial to a commercial channel without the commercial channel's reservation for such use. See, *Siloam Springs, Arkansas*, 2 FCC Rcd 7485 (1987), *aff'd* 4 FCC Rcd 4920 (1989), *Bulls Gap, Tennessee*, MM Docket 94-117, releases September 22, 1995 (DA 95-1981). Finally, even though there is an additional equivalent channel which could be allotted to Rosendale in the even other parties had expressed an interest in applying for Channel 273A, we do not believe that we can invoke the procedure set forth in Section 1.420(g). That rule permits the modification of a station's license to specify a non-adjacent higher class channel with the availability of additional equivalent or superior class channel for use by other interested parties. However, the Commission stated in the *Report and Order* adopting the rule, that the procedure does not apply to stations seeking to switch from a noncommercial band channel to one within the commercial band, finding the issue to be outside the scope of the proceeding.⁶

3. We recognize that the Commission, in *Sioux Falls, South Dakota*,⁷ modified the license of Station KCFS from noncommercial educational Channel 211A to commercial Channel 261A. However, that action corrected an error on the Commission's part when it had misinterpreted the desire of Stations KCFS to provide Sioux Falls with two noncommercial educational services on Channels 211A and 215A and instead deleted the station from Channel 211A. Further, the error was not caught until an application for a new station on Channel 211A had been filed and

granted cut-off protection. The *Notice* in that proceeding advised interested parties of our error and the fact that an additional commercial channel was available to accommodate any expression of interest in a commercial channel. Moreover, in the *Report and Order* granting the modification of Station KCFS from a noncommercial channel to a non-reserved commercial channel, we also noted that Sioux Falls received local noncommercial educational service from four stations and local commercial service from five stations, thus there was no concern that we would be removing the community's sole local noncommercial educational service. Here, Station WFPN provides the community's only local noncommercial educational service and the modification of its license to a non-reserved commercial could result in the loss of the community's sole noncommercial educational service.

4. However, based on petitioner's stated intent to apply for the unreserved channel 273A at Rosendale, we will allot the channel and specify an application filing window. We believe the public interest would be served by allotting Channel 273A to Rosendale, New York, since an interest has been expressed in providing the community with its first fulltime FM service.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 4, 1995**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Rosendale, New York	273A

6. Channel 273A can be allotted to Rosendale in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.7 kilometers (2.9 miles) southeast to avoid a short-spacing to Station WUUU, Channel 273B, Rome, New York.^{8, 9} Canadian concurrence in the allotment has been received since Rosendale is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

7. The window period for filing applications for Channel 273A at Rosendale, New York will, open on **December 4, 1995**, and close on **January 4, 1996**.

8. IT IS FURTHER ORDERED, That the counterproposals filed jointly by Sacred Heart University, Inc. and Radio South Burlington to modify the license of Station WQQQ, Sharon, Connecticut, from Channel 277A to

plemental Comments' and to SUNY Response to SHU/RSB Supplemental Reply Comments" filed by SHU/RSB. The Commission's Rules do not contemplate the filing of pleadings beyond the comment periods set forth in the *Notice*. Moreover, we find that the additional comments do not provide information of decisional significance and therefore will not be considered.

⁵ Petitioner filed comments reiterating its intention to apply for the channel, if allotted. In response to the *Notice*, petitioner also clarified that it does not want channel 273A reserved for noncommercial educational use even though it will continue to operate Station WFPN as a noncommercial station.

⁶ See *Amendment of the Commission's Rules Regarding the Modification of FM and Television Station Licenses*, 56 R.R. 2d

1253, 1257 (1984).

⁷ See *Notice of Proposed Rule Making*, 50 FR 5430, June 19, 1985, *Report and Order*, 51 FR 4169, February 3, 1986.

⁸ The coordinates for Channel 273A at Rosendale are North Latitude 41-49-14 and West Longitude 74-02-13.

⁹ Petitioner, in its reply comments, states that it intends to apply for a construction permit at its presently authorized transmitter site, not the reference coordinates set forth in the *Notice*. The petitioner is not required to submit an application specifying the reference coordinates set forth herein. However, we expect that the application will comply with the technical requirements set forth in the Commission's Rules

Channel 273A, reallocate Channel 273A from Sharon to Washington, New York, and reserve Channel 277A at Sharon for noncommercial educational use. ARE DISMISSED.

9. IT IS FURTHER ORDERED. That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau